Sarojini a/p Narain Nair v Raja Ratnam a/l Arunasalam

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-652 OF 1996
MAHADEV SHANKAR, MOKHTAR SIDIN AND DENIS ONG JJCA
29 JULY 1997

Family Law *— Divorce — Mutual consent — Whether consent was forcibly obtained — Decree nisi granted at hearing of interim injunction — Delay in filing affidavit alleging forced consent — Whether on the facts there was free consent to the decree nisi*

The respondent husband ('H') filed a divorce petition against his wife, the appellant ('W'). He applied and obtained an interim injunction against W. The application to extend the injunction was fixed for further hearing on 9 October 1996. On 9 October 1996, the trial judge adjourned the matter for each party to take further advice on how best to proceed. It was alleged that W then had a discussion with her solicitor and according to him, W had agreed that the divorce should go through. On the same day, by consent, a decree nisi was pronounced and the terms of the property settlement with maintenance was also recorded by consent. The interim injunction was cancelled and no order was made as to costs. W is English educated and everything was being done in English. Some time after this, W changed her solicitors. On 6 November 1996, W's new solicitors filed a notice of appeal against the whole of the decree nisi, alleging inter alia, that she had presented herself on 9 October 1996 for an injunction matter but was forced to deal instead with a divorce petition which was not even scheduled for trial for the said day. She further alleged that the consent was forcibly obtained from her, and that she was never given the opportunity to present her case to the court. H filed a motion in the appeal and urged the court to strike out the appeal on the ground that it was an abuse of process.

Held, striking out the appeal with costs:

The order for decree nisi was made in W's presence. As W is English speaking, she was fully aware of what the trial judge had recorded. Moreover, her affidavit and the grounds urged suggest that after she had changed her solicitors, she had also changed her mind and now felt she could have got a lot more than what she had agreed to. Furthermore, W — if she had indeed been forced to agree to the decree — had failed to state who forced her. The fact that she waited till 19 November 1996 to swear an affidavit speaks for itself. In all the circumstances, it was beyond doubt that W and her solicitors freely consented to the decree nisi which was made on 9 October 1996 (see p 611H–I).

A **[Bahasa Malaysia summary**

Penentang yang merupakan si suami ('H') memfailkan satu petisyen perceraian terhadap isterinya, perayu ('W'). Dia telah memohon dan memperolehi suatu injunksi interim terhadap W. Permohonan untuk melanjutkan injunksi itu telah ditetapkan untuk pembicaraan lanjut
B pada 9 Oktober 1996. Pada 9 Oktober 1996, hakim perbicaraan telah menangguhkan hal itu supaya setiap pihak boleh mengambil nasihat lanjut tentang bagaimanakah hal patut diteruskan. Adalah dihujahkan bahawa W kemudiannya telah mengadakan perbincangan dengan peguamcaranya dan menurut beliau, W telah bersetuju bahawa perceraian harus diteruskan. Pada hari yang sama, dengan persetujuan,
C dekri nisi telah diisytiharkan dan terma penyelesaian harta dengan nafkah juga telah direkodkan dengan kebenaran. Injunksi interim telah dibatalkan dan tiada perintah telah dibuat mengenai kos. W berpendidikan Inggeris dan segalanya dilakukan dalam bahasa Inggeris. Seketika selepas ini, W telah menukar peguamcaranya.
D Pada 6 November 1996, peguamcara W memfailkan notis rayuan terhadap keseluruhan dekri nisi, dengan mengatakan, antara lain, bahawa dia telah mengemukakan diri pada 9 Oktober 1996 untuk suatu perkara injunksi tetapi sebaliknya terpaksa menguruskan petisyen perceraian yang tidak pun dijadualkan untuk perbicaraan untuk hari tersebut. Dia seterusnya mengatakan bahawa kebenaran telah
E diperolehi daripadanya secara dipaksa, dan bahawa dia tidak pernah diberikan peluang untuk mengemukakan kesnya di mahkamah. H memfailkan satu usul dalam rayuan dan menggesa mahkamah membatalkan rayuan atas alasan bahawa ia adalah satu penyalahgunaan proses.

F **Diputuskan**, membatalkan rayuan dengan kos:

Perintah untuk dekri nisi telah dibuat dalam kehadiran W. Oleh kerana W adalah seorang penutur bahasa Inggeris, dia memahami dengan sepenuhnya apa yang direkodkan oleh hakim perbicaraan. Tambahan pula, afidavitnya dan alasan yang diujar mencadangkan
G bahawa selepas dia menukar peguamcaranya, dia juga telah menukar fikirannya dan kini merasakan dia mungkin boleh memperolehi lebih daripada apa yang disetujuinya. Di samping itu, W — jika pun dia telah dipaksa bersetuju kepada dekri — gagal menyatakan siapakah yang memaksanya. Hakikat bahawa dia menunggu sehingga
H 19 November 1996 untuk mengikrar suatu afidavit sudah cukup jelas. Dalam semua keadaan, adalah melampaui keraguan bahawa W dan peguamcaranya bersetuju secara bebas kepada dekri nisi yang dibuat pada 9 Oktober 1996 (lihat ms 611H–I).]

I **Notes**

For cases on divorce, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1859–1985.

Appeal from: Divorce Petition No S5–33–740 of 1996 (High Court, Kuala Lumpur) A

Rasamani Kandiah (Mohd Latip & Associates) for the appellant.
Atma Singh Veriah (Atma Singh Veriah & Co) for the respondent.

Mahadev Shankar JCA (delivering judgment of the court): Sarojini a/p Narain Nair (W) was married to Raja Ratnam a/l Arunasalam (H) on 17 May 1994. They have two sons born in 1975 and 1977. In 1995, W alleges that H left the matrimonial home to live with another woman. B

The marriage came under strain. Matrimonial proceedings were initiated. W appointed Encik Jagjit Singh to act as her solicitor on 25 June 1996.

After withdrawing a petition for judicial separation filed earlier, H filed a divorce petition against W on 14 September 1996. At the same time, he filed a summons in chambers for an injunction to prevent further alleged molestation by W. An interim injunction was granted and the application was fixed for further hearing on 9 October 1996. On 4 October 1996, W filed an affidavit in reply. C D

On 9 October 1996, H and W both appeared before the judge who saw them in chambers and spoke to them in the presence of counsel. H and W are both English educated. W was a teacher before she became involved in direct selling. By this date, the time limit for filing the answer had lapsed. W's solicitor had the answer ready but claims he was instructed not to file it yet. E

The matter which was to be dealt with that day was whether the interim injunction should be extended. From the affidavits before him, the trial judge obviously thought the 'Gordian knot' should be cut. In the presence of H, and W and their respective counsel, the trial judge inquired their differences, the matrimonial assets available for division, the income available for maintenance of the parties and the education of the two sons in the United Kingdom (both of whom were adults by now) and the quantum of maintenance which would be reasonable for W. It was apparent that the marriage had irretrievably broken down but W indicated that she did not want a divorce. The trial judge then adjourned the matter to 2.30 pm for each party to take further advice on how best to proceed. Outside the judge's chambers, W had a discussion with her solicitor. According to him, W then saw the light and agreed that the divorce should go through. F G

W and her solicitors, and H and his solicitors then went before the judge and by consent, a decree nisi was pronounced and the terms of the property settlement with maintenance at RM3,000 per month for W was also recorded by consent. The interim injunction was cancelled and no order was made as to costs. It is idle to contend that W did not know what was going on at the time because everything was being done in English. H

Some time after this, W changed her solicitors to Mohd Latip & Associates. There had been some correspondence about the transfer of some property and the non-acceptance by W of the maintenance cheques. On 6 November 1996, W's new solicitors filed a notice of appeal against the whole of the decree nisi. W swore an affidavit setting out the entire I

history. When it came to the events before the trial judge on 9 October 1996, she flatly stated as follows appeal record p 56:

> (21) Upon his arrival, the matter was heard in chambers, wherein I was instructed to consent the divorce and to consent to the maintenance sum of RM3,000 per month and the said property known as No 15, Jalan SS 21/25, Damansara Utama be transferred to me.
>
> (22) All along, I made it known to the court and to my solicitors that I did not want a divorce.
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> (23) I presented myself on 9 October 1996 for an injunction matter, but I was forced to deal with a divorce petition which was not even scheduled for trial for the said day.
>
> (24) The consent was forcibly obtained from me, as I was told the terms of settlement would be the same even if it was heard in open court.
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> (25) I was never given the opportunity to present my case to the Honourable court, neither was I given opportunity to bring witnesses to support my case.
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> (26) There is a co-respondent involved, but this issue was never discussed in terms of damages.
>
> (27) The manner in which the divorce petition was disposed was unjust and unfair to me specially so.

This affidavit was filed in support of a motion for an order that the decree nisi be cancelled and the divorce petition be heard afresh. The motion was fixed for hearing on 7 January 1997. Affidavits in opposition were filed by H.

The motion was not heard on 7 January. On 16 January 1997, both H and Jagjit Singh filed affidavits setting out their versions of what happened. W's solicitors withdrew the motion.

The appeal was proceeded with. A memorandum of appeal was filed on 10 January 1997 more or less repeating all W's complaints made in her affidavit earlier.

Whilst the appeal was pending, H filed a motion in the appeal on 3 May 1997 with a supporting affidavit. Affidavits in opposition were filed by W. H's prayer was that this appeal be struck out on the ground that it was an abuse of process.

In all the circumstances, we are satisfied beyond doubt that W and her solicitors freely consented to the decree nisi which was made on 9 October 1996. The order was made in W's presence. As W is English speaking, she was fully aware of what the trial judge had recorded.

After she changed her solicitors, it would appear that she changed her mind. Her affidavit and the grounds urged suggest that with the benefit of hindsight and more resourcesful advice, she now felt she could have got a lot more than what she had agreed to.

We regret to say that we found this volte-face most unimpressive. If W had in fact been 'forced' to agree, why does she not say who forced her? The fact that she waited till 19 November 1996 to swear an affidavit speaks for itself.

Consequently, the only order we could make was to strike out this appeal with all costs to be taxed and paid by the appellant to the respondent. The deposit will be paid out to the respondent towards taxed costs.

Appeal struck out.

Reported by Loo Lai Mee